

**EMPLOYMENT APPEALS TRIBUNAL**

CLAIMS OF:  
EMPLOYEE - *claimant*

CASE NOS.  
UD436/2009  
MN440/2009

against

EMPLOYER – *respondent*

under

**UNFAIR DISMISSALS ACTS, 1977 TO 2007  
MINIMUM NOTICE AND TERMS OF EMPLOYMENT ACTS, 1973 TO 2005**

I certify that the Tribunal  
(Division of Tribunal)

Chairman: Mr. J. Sheedy

Members: Ms. M. Sweeney  
Ms. P. Doyle

heard this claim at Cork on 22<sup>nd</sup> February 2010

Representation:

Claimant: Declan O'Toole of Declan O'Toole & Co. Solicitors,  
Holbar House, East Douglas Village, Douglas, Cork

Respondents: Mr. Philip Comyn of O'Connor Dudley & Comyn Solicitors,  
West End, Mallow, Co. Cork

The determination of the Tribunal was as follows:-

The claim under the Minimum Notice and Terms of Employment Acts 1973 to 2005 was withdrawn.

**Respondent's Case**

The managing director of the respondent gave evidence. The company provided security guards to shops and sites. The claimant started work in February 2005. The claimant visited customers, checked staff on site, did the rosters and hired and fired staff. The claimant was an able and conscientious worker.

In the years up to 2008 the company was growing. A total of 140 people were employed, including 8 office staff. Then about August 2008 customers stopped paying, there was no new business and

turnover dropped. The company was in profit in October 2008. Unfortunately it had bad debts amounting to €160k.

The managing director spoke to the claimant, they could both see that there was a downturn. Their discussions were informal ones over coffee. They did not have formal meetings. The claimant realised that drastic changes were needed. A sales manager and an administrator were let go. They stopped advertising in the yellow pages and took the fuel cards from the office staff.

The managing director took the decision to reduce the office staff from 8 to 3, leaving himself, the training guy and the finance girl. When the claimant joined the company he took work from the managing director. Now the managing director needed to do a lot more work. He increased his hours of work from 35 to about 70 per week. An important part of the claimant's work was visiting clients on site and the managing director could do this with his increased working hours. The claimant suggested that office staff could do security work and less office work. He suggested that he could do invoicing. In the managing director's opinion this was not an option, the claimant was not familiar with the computer system and it would take time to get him up to speed. Meanwhile the finance girl was very experienced and also looked after credit control. The training manager had a FETAC qualification that the claimant did not. The managing director gave the claimant the choice of working his notice or leaving that day. The claimant opted to finish that day.

At one time claimant had looked after training but due to pressure on his time this function had to be outsourced. When a training manager was employed he looked after training. The training manager was a registered trainer. Unfortunately the training would be useless unless a registered trainer signed the certificates.

The claimant was a friend of the family so the managing director phoned him the night before he was made redundant to tell him. The claimant said it was a rash decision and that there were options. Unfortunately the alternatives would not result in the necessary savings. The accountant had told the managing director that he needed to cut €100k from the wages bill. There is a JLC in place so cutting wages was not an option. The office staff had to be reduced. As well as looking at savings in wages the managing director looked at what he could do himself.

### **Claimant's Case**

The claimant gave evidence. In January 2005 he was made redundant from a position with a security firm. He knew the managing director of the respondent, but not well, he had a meeting with him and started work in February 2005. He was the operations manager on one site. At that time the managing director and two others worked in the office. As time went on he became the general manager and as a result the managing director was able to reduce his working hours.

At that time the business was very busy providing security for retail outlets. At its peak the business was supplying 4.5k hours a week of security cover in the time leading up to Christmas. They also did some industrial work but it went up and down and did not result in long-term contracts.

In mid 2008 the managing director re-employed a former employee as the training manager. The training manager had some qualifications but the claimant had the same certificates. However the respondent sent the training manager on a refresher course. The claimant was not given the opportunity to go on such a training course.

At around the same time as the training manager was re-employed a sales manager was recruited

and an administrator was also appointed. The office was getting crowded.

Then in October 2008 the managing director phoned the claimant and told him that 3 staff members would be let go. The claimant went to the office to meet the managing director. The claimant understood that it was necessary to cut costs. He suggested cancelling some insurance. Uniforms were a big expense but security personnel do not like wearing second-hand uniforms, no much saving could be made there. The managing director had decided to let the sales manager and one of the administrators go. The claimant suggested letting the training manager go as he could cover training. The claimant was also prepared to work shifts and to go back on site. The claimant was willing to do anything to keep his job. But he did accept that there had been a significant downturn in business and that something had to happen as a result. The meeting between the claimant and the managing director ended without a decision being made. Later that day the managing director sent the claimant a text saying that his redundancy payment was in his bank account.

The claimant was shocked to be let go. He considered himself to be the managing director's right hand man. He always had a good working relationship with the managing director. The claimant was not a registered trainer at the time he was let go but was confident that obtaining registration would have been a formality.

## **Determination**

### **Dissenting Opinion of Ms. Maire Sweeney**

The facts of the case are as set out in the determination, however, I do not share my colleagues' view that the dismissal by reason of selection for Redundancy amounted to an unfair Dismissal. It was agreed by all that a number of alternatives were discussed, reduction in hours, returning to front line security duties, pension reduction etc. The respondent indicated that these were not sufficient to meet or address the size of the problem.

The key comparator raised by the claimant in relation to his selection was the role of Training Manager. The claimant held the role of General Manager in the respondent company and was, according to the evidence, involved in the decision to rehire the Training Manager, who took up his appointment on 28<sup>th</sup>. April 2008. The redundancy situation arose very suddenly when one of the major clients failed to pay a substantial sum and significant bad debts started to mount in the Sept/Oct period necessitating radical cutbacks.

The evidence was that the Training Manager, previously worked in the company in a different role, but had been working as a trainer prior to joining the Company in 2008. The respondent's evidence was that the Training Manager was retained due to his registration and recognition as a certified industry trainer. This registration enabled him to sign off and issue industry recognised Training Certificates to clients, which is a regulatory requirement in the industry.

The provision of certified training was a source of revenue for the respondent company at a time of significant bad debts and fall off in the traditional static guard business. The Accountant had indicated that the business needed to cut over €100,000 from its cost base in a relatively short time frame. Maintaining sources of revenue was important to the business.

The claimant accepted that he was not suitable for the accounts role and believed that he could have done the training role and should have been given the opportunity to do so. The respondent indicated that in the past he had discussions with the claimant about registration but that it did not happen. The claimant in evidence made the point that he could have been registered. At the time of the redundancy selection the claimant was not registered as a trainer. According to a letter to the Tribunal dated 10/3/2010 from the claimant's solicitor he confirmed

this position “He could have achieved registration as a trainer by simply making the requisite application”. This he did not do while working for the respondent or since.

The need for redundancies was not in dispute. The respondent did not utilise last in first out as the selection method nor was there an existing precedent for selection in place. The respondent is entitled to select on the basis of other factors, cost, skill set, knowledge, qualification and/or experience all other things being equal length of service.

In my view on balance, the evidence that the selection was based on the need to retain a registered person to deliver certified external training as a revenue earning service was reasonable in the circumstances and, therefore, I do not agree with my colleagues decision that the selection of the Claimant for Redundancy amounted to an Unfair Dismissal.

Having carefully considered all the evidence the Tribunal finds by a majority decision that the claimant was unfairly dismissed. The Tribunal accepts that the respondent was faced with a decline in business and also with a significant bad debt problem. The respondent needed to take action in response to the changed business environment. However the respondent failed to engage in a meaningful consultation with the claimant on alternative courses of action. Also the claimant was not put on notice that his position was at risk of being made redundant. The claim under the Unfair Dismissals Acts, 1977 to 2001 succeeds and the claimant is awarded the sum of €15,000.00. This sum is in addition to any redundancy payment he received.

Sealed with the Seal of the

Employment Appeals Tribunal

This \_\_\_\_\_

(Sgd.) \_\_\_\_\_  
(CHAIRMAN)